Supreme Court, U.S.
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No. ____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

STATE OF MAINE,
Petitioner

V.

JAY G. THIBODEAU,
Respondent

ON WRIT OF CERTIORARI TO THE
SUPREME JUDICIAL COURT OF THE
STATE OF MAINE

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether Respondent, who was not under arrest, was "in custody" for purposes of Miranda v. Arizona, 384 U.S. 436 (1966), simply because he (1) was the focus of a criminal investigation, (2) felt that he had to comply with a police request to show them the route he claimed to have taken on the day in question, and (3) was seated in the back seat of a two-door automobile during the drive in which Respondent showed the police his alleged route?

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The opinion of the Supreme Judicial Court of Maine in State of Maine v. Jay G. Thibodeau, Decision No. 3897, Law Docket No. Pen-84-195 (Decided July 31, 1985), which held that Mr. Thibodeau was subjected to custodial interrogation without the necessary Miranda warning, is published at 496 A.2d 635 (Me. 1985) and is reproduced in Appendix A to this petition. The Maine Superior Court order finding that Mr. Thibodeau was not in custody for purposes of Miranda v. Arizona, 384 U.S. 436 (1966), is reproduced in Appendix B to this petition.

JURISDICTION

The judgment of the Supreme Judicial Court of Maine in State of Maine v. Jay G. Thibodeau, Decision No. 3897, Law Docket

No. Pen-84-195 (Decided July 31, 1985), was entered on July 31, 1985, and the Court's mandate issued the same day. The sixty-day period provided in U.S. Sup. Ct. Rule 20.1 for filing a certiorari petition would have ended on September 30, 1985. Pursuant to Rule 20.1, Mr. Justice Brennan, by order dated September 3, 1985, extended the State's time for filing its petition for certiorari by twenty-nine (29) days to and including October 29, 1985.

Petitioner State of Maine invokes the jurisdiction of the Supreme Court of the United States pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the Constitution of the United States:

> No person shall be held to answer for a capital,

> or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

On October 27, 1983, the police received a report that John Tower, Jr., was missing. That evening the police found Tower's automobile, which had been abandoned near Interstate 95 in Sherman, Maine. The police learned from Tower's mother and a neighbor that Respondent Jay

G. Thibodeau was with Tower on October 27th and had been holding a rifle while talking to Tower. The police also learned that the eighteen-year-old Thibodeau was interested in buying Tower's automobile and that Tower had told his mother just before he disappeared that he would be taking Thibodeau for a test drive. App. A at 3-4; State v. Thibodeau, 496 A.2d 635, 637 (Me. 1985).

On the morning of October 28th, three Maine State Police officers, including Trooper Ronald Graves (S.H.T. at 15),[1] went to the Thibodeau apartment where they spoke with Respondent in the presence of his parents for approximately five to ten minutes. Respondent told the officers that he and Tower had gone for a test drive in

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[1] References to pages of the transcript of the suppression hearing shall be as follows: S.H.T. at ___.

Tower's automobile the day before and that Tower had dropped off Thibodeau at his home. Respondent stated that he had then walked along Route 11 with his rifle, eventually going hunting on Happy Corner Road.[2] App. A at 4-5; Thibodeau, 496 A.2d at 637.

Trooper Graves, who was dressed in civilian clothing (S.H.T. at 15), and another plainclothes police officer returned to the Thibodeau apartment in the afternoon of October 28th. S.H.T. at 21-22. They asked Respondent to accompany them and show them the route that, according to his statements in the morning, he had taken the day before. Respondent

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[2] Although the police did not make any threats or promises (S.H.T. at 122), Respondent testified that he felt that he had to talk with the officers at this time and that he had no choice but to talk with them. Respondent could not explain the reason for this feeling. S.H.T. at 115-16.

agreed to go. S.H.T. at 23, 52. His purpose in showing the officers the route he claimed he had followed the day before was to lead the police astray.[3] S.H.T. at 123; App. A at 37, 46-47 (Wathen, J., dissenting); Thibodeau, 496 A.2d at 643, 645 (Wathen, J., dissenting).

The two officers and Respondent got into the officers' unmarked two-door automobile. S.H.T. at 23-24. The Respondent sat in the back seat by himself, and the two officers sat in the front seat. They started down the street and then pulled off onto a side street where

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[3] Although the police again did not make any threats, promises, or physical contact with Respondent (S.H.T. at 51, 123), Respondent testified, just as he had with respect to the morning conversation, that he felt that he had to go with the officers and had no choice but to accompany them. Respondent again was unable to offer a reason for this feeling. S.H.T. at 116; App. A at 17; Thibodeau, 496 A.2d at 639.

they stopped to permit one officer to take notes while Respondent repeated and also expanded on what he had told the police in the morning regarding his activities with Tower and alleged hunting route on October 27th. S.H.T. at 23-25, 45-50; App. A at 6-7; Thibodeau, 496 A.2d at 637; App. A at 38-39 (Wathen, J., dissenting); Thibodeau, 496 A.2d at 643-44 (Wathen, J., dissenting). The estimated time of this stop varies from 15 to 40 minutes. S.H.T. at 25, 50; App. A at 7; Thibodeau, 496 A.2d at 637; App. A at 38 (Wathen, J., dissenting); Thibodeau, 496 A.2d at 643-44 (Wathen, J., dissenting). After this stop, the three retraced the complicated route Thibodeau had outlined. It took about an hour of driving to cover the entire route. During this time, Respondent never asked to

leave the car and the officers did not ask Respondent if he wished to take a break or return home. App. A at 7-8, 18-19, 20; Thibodeau, 496 A.2d at 637, 639-40; App. A at 38-44, 46 (Wathen, J., dissenting); Thibodeau, 496 A.2d at 644-45 (Wathen, J., dissenting). At the conclusion of the drive, the officers returned Thibodeau to his home and left. Thibodeau was not placed under arrest. S.H.T. at 55-56; App. A at 43 (Wathen, J., dissenting); Thibodeau, 496 A.2d at 645 (Wathen, J., dissenting).

John Tower's body was found on October 30, 1983, with a bullet hole in his head. App. A at 2; Thibodeau, 496 A.2d at 636. Respondent was arrested two days later on November 1, 1983. App. A at 8; Thibodeau, 496 A.2d at 637. On November 8, 1983, a

Penobscot County Grand Jury indicted Respondent for murder. Respondent subsequently filed a motion to suppress his statements to the police on the morning and afternoon of October 28th on the ground, inter alia, that he was subjected to custodial interrogation without the necessary Miranda warnings. This motion was denied by the Maine Superior Court, which found:

> The statements given on the 28th were voluntary, beyond a reasonable doubt. Further, the circumstances did not constitute custodial interrogation. Thibodeau cooperated with the detectives in generally non-coercive settings. Neither his situation in the cruiser nor the suspicions of the police reached a level requiring a statement of Thibodeau's "rights".

App. B at 49.

Following his conviction of murder in a jury trial in Maine Superior Court (Penobscot County), Respondent appealed to the Maine Supreme Judicial Court, alleging that he was "in custody" for purposes of Miranda v. Arizona, 384 U.S. 436 (1966), when he made his statements in the morning and afternoon of October 28th. The Maine Supreme Judicial Court unanimously held that Respondent was not in custody in the morning of October 28th. The Court split 4-3, however, with regard to the afternoon statements. A majority of the Court found custody on the grounds that (1) by the afternoon the police investigation had focused on Respondent as the "only suspect" (App. A at 17; Thibodeau, 496 A.2d at 639 (emphasis in opinion)); (2) a reasonable person would have felt, as did Respondent,

that he had no choice but to accompany the officers in the afternoon of October 28th; and (3) Respondent's situation in the back seat of the two-door unmarked police cruiser with the two officers in the front seat amounted to a deprivation of his freedom in a significant way. App. A at 17-19 & n.1; Thibodeau, 496 A.2d at 639-40 & n.1. Having found custody, the four-member majority held that the police obtained Thibodeau's afternoon statements in violation of Miranda and vacated the murder conviction.

The three-member dissent (Wathen, J., joined by McKusick, C.J., and Roberts, J.) found that the focus of the police investigation and Respondent's situation in the police cruiser did not amount to custody under Miranda, i.e., did not

constitute a "formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." App. A at 36-46 (Wathen, J., dissenting); Thibodeau, 496 A.2d at 643-45 (Wathen, J., dissenting) (quoting California v. Beheler, 463 U.S. 1121, 1125 (1983)). In reaching this conclusion, the dissent recognized that this Court has expressly rejected the notion that police "focus" and a "coercive environment" amount to custody for purposes of Miranda. App. A at 36-37, 44-45 (Wathen, J., dissenting); Thibodeau, 496 A.2d at 643, 645 (Wathen, J., dissenting) (citing Beheler; Oregon v. Mathiason, 429 U.S. 492 (1977); Beckwith v. United States, 425 U.S. 341 (1976)).

REASON FOR GRANTING THE WRIT

A MAJORITY OF THE MAINE SUPREME JUDICIAL COURT HAS DECIDED THE ISSUE OF WHETHER RESPONDENT WAS "IN CUSTODY" UNDER MIRANDA IN A WAY THAT DIRECTLY CONFLICTS WITH THIS COURT'S DECISIONS IN CALIFORNIA V. BEHELER, OREGON V. MATHIASON, AND BECKWITH V. UNITED STATES.

In State v. Thibodeau, 496 A.2d 635 (Me. 1985), a majority of the Maine Supreme Judicial Court held that Respondent was "in custody" for purposes of Miranda v. Arizona, 384 U.S. 436 (1966), on the basis of a combination of factors - viz., 1) the focus of the police investigation on Respondent and 2) certain allegedly coercive aspects of Respondent's interaction with the police - that this Court has expressly held do not constitute custody. Since previous decisions of the

Supreme Court show clearly that there was no custody under the circumstances of the instant case, the Maine Court's holding to the contrary should be summarily reversed or, alternatively, subjected to plenary review by this Court.

The first factor on which the Maine Court relied was that by the afternoon of October 28, 1983, in light of the interview with Thibodeau that morning, the police investigation of John Tower's disappearance had focused on Respondent as the "only suspect." App. A at 16-17; Thibodeau, 496 A.2d at 639 (emphasis in opinion). In California v. Beheler, 463 U.S. 1121 (1983) (per curiam), however, this Court reiterated what it had said in Beckwith v. United States, 425 U.S. 341, 347 (1976), that Miranda's "in custody" requirement is

not satisfied merely because police knowledge about the crime has reached a level where the person interviewed by the police is the "focus" of the criminal investigation. Beheler, 463 U.S. at 1124 n.2. This Court also repeated in Beheler what it had earlier stated in Oregon v. Mathiason, 429 U.S. 492 (1977) (per curiam), that "Miranda warnings are not required 'simply... because the questioned person is one whom the police suspect.'" Beheler, 463 U.S. at 1125 (quoting Mathiason, 429 U.S. at 495). In view of Beheler, Mathiason, and Beckwith, the great weight that the Maine Court attached to the fact that the police had focused on Respondent as the "only suspect" (App. A at 17; Thibodeau, 496 A.2d at 693 (emphasis in opinion)) is misplaced.

The second factor on which the Maine Court relied to find custody were the allegedly coercive aspects to Thibodeau's afternoon interaction with the police. These included the facts that (1) in the majority's view a reasonable person would have felt, as did Respondent, that he had no choice but to accompany the officers (App. A at 17-18; Thibodeau, 496 A.2d at 639), and (2) Respondent was in the back seat of the two-door police car and never asked by the police if he wanted to leave. App. A at 18-19; Thibodeau, 496 A.2d at 639-40 (footnote omitted). Neither one of these facts, however, supports a finding of custody.

This Court has expressly rejected the notion that custody exists simply because a reasonable person, who has neither been

formally arrested nor been restrained in his freedom of movement, feels when in the presence of police officers that he must answer their questions or comply with their requests:

> [A] noncustodial situation is not converted to one in which Miranda applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a "coercive environment." Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer Miranda warnings to everyone whom they question.

Mathiason, 429 U.S. at 495 (emphasis added), quoted in Beheler, 463 U.S. at 1124. Accordingly, Mathiason and Beheler flatly contradict the Maine Court's test for determining custody, viz., whether "a reasonable person" would be led "to believe he was not free to leave the presence of the police." App. A at 12; Thibodeau, 496 A.2d at 638.[4]

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[4] The Maine Court's test expressly relied on this Court's analysis in United States v. Mendenhall, 446 U.S. 544, 554 (1980), of when a person has been "seized" within the meaning of the Fourth Amendment. App. A at 13; Thibodeau, 496 A.2d at 638. In Berkemer v. McCarty, 104 S.Ct. 3138, 3148-52 (1984), however, this Court expressly held that a Fourth Amendment seizure falling short of an arrest - e.g., a traffic stop in that case - does not amount to custody under Miranda. See Berkemer, 104 S.Ct. at 3149-50 & n.25 (stopped motorist not in custody even though "the aura of authority surrounding an armed, uniformed officer and the knowledge that the officer has some discretion in deciding whether to issue a citation, in combination, exert some pressure on the detainee to respond to questions").

The majority's focus on Respondent's situation in the back seat of the two-door unmarked police vehicle is similarly misplaced. The Maine Court stated that

> in order for [Thibodeau] to have left the cruiser, an officer in the front would have had to open one of the doors and pull his seat forward. Similarly, in the hour and a half that the Defendant was with the officers in this police-dominated atmosphere, he was never asked if he wished to take a break or return home.

App. A at 18-19; Thibodeau, 496 A.2d at 639-40 (footnote omitted). Thibodeau's approximately half-hour interview and one-hour drive in the police vehicle are analogous, however, to the thirty-minute police station interviews in Beheler and Mathiason which this Court said did not

constitute custody.[5] Moreover, Respondent's location in the back seat of the cruiser corresponds to the situation of the defendant in Mathiason who was interviewed behind a closed door in an office inside the police station. Mathiason, 429 U.S. at 493. The Supreme Court nevertheless stated in both Mathiason and Beheler that "Miranda warnings are not required 'simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect.'" Beheler, 463 U.S. at 1125 (quoting Mathiason, 429 U.S. at 495).

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[5] The interview of from 15 to 40 minutes in this case (S.H.T. at 25, 50; App. A at 7; App. A at 38 (Wathen, J., dissenting)) corresponds in length to the thirty-minute interviews in Mathiason and Beheler. Respondent spent the additional hour in the police cruiser simply showing the police the complicated route he had outlined in the interview. App. A at 7-8, 18, 20; App. A at 38-43, 46-47 (Wathen, J., dissenting).

The ultimate inquiry in determining whether a person is in custody for purposes of Miranda is "whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." Beheler, 463 U.S. at 1125 (quoting Mathiason, 429 U.S. at 495). Here Thibodeau was not under arrest on October 28, 1983, and was not placed under arrest until November 1, 1983. App. A at 8; Thibodeau, 496 A.2d at 637. Nor did Thibodeau's interaction with the police on the afternoon of October 28th rise to the level of a restraint on freedom of movement of the degree associated with a formal arrest. The police went to the Thibodeau apartment and asked Respondent in the presence of his parents (S.H.T. at 23), without making any threats, promises, or

physical contact (S.H.T. at 51, 123), if he would accompany the officers and show them the route he claimed to have taken the day before. App. A at 6; Thibodeau, 496 A.2d at 637; App. A at 33, 38 (Wathen, J., dissenting); Thibodeau, 496 A.2d at 642, 643 (Wathen, J., dissenting). Respondent answered that he would go with the officers. S.H.T. at 23, 52. His purpose was "to keep them off [his] track." S.H.T. at 123; App. A at 37, 46-47 (Wathen, J., dissenting); Thibodeau, 496 A.2d at 643, 645 (Wathen, J., dissenting).

Once inside the police automobile, they started down the street and pulled off onto a side street where they stopped to permit one officer to take notes while Respondent repeated and also expanded on what he had told the police in the morning regarding

his activities with Tower and alleged hunting route on October 27th. S.H.T. at 23-25, 45-50; App. A at 6-7; Thibodeau, 496 A.2d at 637; App. A at 38-39 (Wathen, J., dissenting); Thibodeau, 496 A.2d at 643-44 (Wathen, J., dissenting). The estimated time of this stop varies from 15 to 40 minutes. S.H.T. at 25, 50; App. A at 7; Thibodeau, 496 A.2d at 637; App. A at 38 (Wathen, J., dissenting); Thibodeau, 496 A.2d at 643-44 (Wathen, J., dissenting). After this stop, the three retraced the complicated route Thibodeau had outlined. It took about an hour of driving to cover the entire route. During this time, Respondent never asked to leave the car and the officers did not ask Respondent if he wished to take a break or return home. App. A at 7-8, 18-19, 20; Thibodeau, 496

A.2d at 637, 639-40; App. A at 38-44, 46 (Wathen, J., dissenting); Thibodeau, 496 A.2d at 644-45 (Wathen, J., dissenting). At the conclusion of the drive, the officers returned Thibodeau to his home and left. Thibodeau was not placed under arrest. S.H.T. at 55-56; App. A at 43 (Wathen, J., dissenting); Thibodeau, 496 A.2d at 645 (Wathen, J., dissenting).

Given the nature of Respondent's 15-to-40 minute interview and one-hour drive with the police - viz., to explain and show to them his route on October 27th - Respondent's location in the back seat rather than the front seat did not affect the coerciveness of the environment in any material way. It is also immaterial that the officers never advised Respondent that he was free to leave and would be returned

home at any time he wished, especially since Respondent himself was using the encounter to try to keep the officers "off [his] track." See App. A at 46-47 (Wathen, J., dissenting); Thibodeau, 496 A.2d at 645 (Wathen, J., dissenting).

Under these circumtances, there was no restraint on Respondent's freedom of movement of the degree associated with a formal arrest. Hence, there was no custody, and the Maine Court's holding to the contrary should be reversed.

CONCLUSION

For these reasons, this petition for a writ of certiorari to the Supreme Judicial Court of the State of Maine should be granted, and the judgment and opinion of the Maine Supreme Judicial Court in State of Maine v. Jay G. Thibodeau, 496 A.2d 635

(Me. 1985), should be summarily reversed or, alternatively, subjected to plenary review by this Court.

Respectfully submitted,

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Dated: October 28, 1985

CERTIFICATE OF SERVICE

I, Wayne S. Moss, Assistant Attorney General, hereby certify that pursuant to U.S. Sup. Ct. Rule 28.3 I have caused three (3) copies of the foregoing "Petition for a Writ of Certiorari" to be served on the only other party to this proceeding by depositing said copies in the United States Mail, postage prepaid, addressed to Respondent's Counsel of Record, Jeffrey L. Hjelm, Esquire, as follows:

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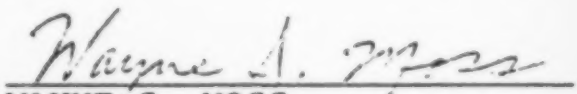
Dated at Augusta, Maine, this 28th day of October, 1985.



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APPENDIX A

MAINE SUPREME JUDICIAL COURT

Reporter of Decisions
Decision No. 3897
Law Docket No. Pen-84-195

STATE OF MAINE

V.

JAY G. THIBODEAU

Argued January 9, 1985
Reargued June 12, 1985
Decided July 31, 1985

Before McKUSICK, C.J., and NICHOLS, ROBERTS, VIOLETTE, WATHEN, GLASSMAN and SCOLNIK, JJ.

NICHOLS, J.

The Defendant, Jay G. Thibodeau, appeals from his conviction of murder, 17-A M.R.S.A. § 201(1)(A) (1983), following a jury trial in Superior Court, Penobscot County. He argues that the Superior Court erred in denying his motions: (1) to suppress certain statements that he made to

investigating officers on three different occasions; and (2) to strike evidence concerning the test firing of the murder weapon. He further challenges the sufficiency of the evidence to support his conviction.

Because we conclude it was reversible error to deny the Defendant's motion to suppress the statements he made in the afternoon of October 28, 1983, we must vacate the judgment of conviction.

On October 30, 1983, a hunter found the body of John Tower, Jr., of Patten, near Shin Pond in that town; the body was partially covered by a piece of carpeting. Death was attributed to a bullet wound to the head and brain. A small caliber bullet, probably fired from at least a foot and a half, had entered behind the victim's right ear. A pool of blood and Tower's

broken glasses were found next to each other approximately 17 feet from his body. A new spent casing, later confirmed to be one fired from a .22 caliber rifle that the Defendant had purchased on October 18 and traded on October 29 for another rifle, was found at the scene approximately 51 feet from the glasses in a direction towards the water. Subsequent test firings of the weapon had revealed that the maximum distance a casing would be ejected was 13 feet and 9 inches.

Tower had been reported missing by his brother in the afternoon of October 27, 1983. That evening Trooper Ronald Graves, of the State Police, found Tower's automobile, a green 1973 Ford Galaxy, parked near Route I-95 in Sherman. A "for sale" sign rested on the seat of the vehicle. An investigation into the

circumstances surrounding the abandoned vehicle and Tower's disappearance commenced the next morning, October 28. The victim's mother had informed Trooper Malcolm Dow, of the State Police, that the last time she saw her son was the day before when he had told her that he was taking a prospective buyer for his car on a test drive. She remembered seeing the prosepective buyer and offered a description that proved to match that of the Defendant. She also that day noticed a gun lying on the concrete near the passenger's door of Tower's car as it was parked near her home. A neighbor of Tower's identified the Defendant as the person who was talking to Tower and holding a rifle.

Sergeant Schofield, Trooper Graves and Trooper Dow, of the State Police, went to the Thibodeau apartment at approximately

8:00 A.M. on October 28 to speak with the Defendant, then barely eighteen years old, concerning the information that had been collected. The officer's conversation with the Defendant, took place in a kitchen area, with the Defendant's parents both present, and lasted for five to ten minutes. During that time the Defendant declared that he had left his house to go hunting and had walked past the Tower residence when he noticed a "for sale" sign in Tower's automobile. He told the officers that he and Tower went for a test drive down the road, bought ten dollars worth of gasoline, and proceeded around the block where Thibodeau was dropped off at his home. He told them that Tower then drove away as the Defendant walked along Route 11 with his rifle, eventually going hunting on Happy Corner Road.

At approximately 3:15 P.M. of the same day came the critical confrontation. At that time Troopers Graves and Porter, of the State Police, returned to the Thibodeau residence. They asked the young Defendant to accompany them and show them the route he had taken the day before. Because by afternoon the officers had come to regard the Defendant as a prime suspect of foul play in Tower's disappearance, their ploy was to separate him from his parents. He had not been so regarded at the time of their brief conversation with him that morning. Nevertheless, no Miranda warnings were given.

When the youth complied with the officers' request and the three got into a two-door cruiser, they seated the young Defendant alone in the back of the vehicle. Instead of thereupon retracing

the route taken on October 27, the asserted purpose of this second confrontation, once in the cruiser, he was driven to a side street where the two troopers talked with him for up to 40 minutes. In response to the officers' questions, the Defendant disclosed to them that: (1) he did not take his rifle with him during the test drive, but rather hid it across the street under a boat; (2) he and Tower drove down back roads; (3) he was dropped off at his parents' apartment at around noon; and (4) he went hunting until 4:00 P.M. or later and then had returned home. Only after this extensive questioning did the Defendant show the officers the route he claimed he had travelled. At one point during the drive he asked if he was a suspect; Trooper Porter responded that the Defendant was the last person to be seen

with Tower. Thereupon the Defendant declared, "Well, I guess I am."

Four days later, Troopers Porter and Graves went to the Thibodeau residence at 9:30 A.M. to arrest the Defendant for the murder of John Tower, Jr. The officers did not possess an arrest warrant, but upon representing to the Defendant's mother and the Defendant that they were there to "talk to Jay and fingerprint him for elimination," the Defendant left with the officers and was placed in a cruiser; this time the officers read to him his Miranda rights. Upon arriving at the Houlton Police Department, the Defendant was taken to an interrogation room and asked if he wished to have a lawyer present. The Defendant responded that he was willing to proceed without a lawyer and gave a statement which was tantamount to a

confession; this statement was recorded and subsequently played for the jury at his trial. In the recorded statement the Defendant stated that he left his house on October 27 at 9:30 or 9:45 A.M. to go hunting. His rifle was not loaded at the time. He had walked by Tower's car that was for sale and had stopped to talk with Tower for 15 to 20 minutes, prior to going on a test drive with him. The Defendant put his rifle on the back seat. They stopped for gas and eventually drove to Shin Pond. The Defendant pointed out his grandfather's camp and, when the Defendant thought they were leaving to go back to town, Tower drove toward the shore of the pond. The Defendant loaded his gun and went into the woods to look for birds. He returned to the car, put his loaded gun on the back seat, and walked to the water with

Tower. They talked for a while about Tower's father who had been ill and, as they walked back to the car, Tower grabbed the Defendant's arm. The Defendant broke away and Tower ran after him. The Defendant rushed to the car, grabbed his gun, and shot Tower. The Defendant moved the body and drove away in Tower's car. After completing his oral confession, the Defendant provided a written confession, which encompassed essentially the same information as his oral statements, except that in writing the Defendant claimed that Tower walked after him rather than ran in pursuit.

A few days later the Defendant was indicted for murder, 17-A M.R.S.A. § 201(1)(A) (1983), and trial commenced on May 21, 1984. The taped and written confessions vary slightly from the

that he had no choice but to accompany the officers in the afternoon of October 28th; and (3) Respondent's situation in the back seat of the two-door unmarked police cruiser with the two officers in the front seat amounted to a deprivation of his freedom in a significant way. App. A at 17-19 & n.1; Thibodeau, 496 A.2d at 639-40 & n.1. Having found custody, the four-member majority held that the police obtained Thibodeau's afternoon statements in violation of Miranda and vacated the murder conviction.

The three-member dissent (Wathen, J., joined by McKusick, C.J., and Roberts, J.) found that the focus of the police investigation and Respondent's situation in the police cruiser did not amount to custody under Miranda, i.e., did not

constitute a "formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." App. A at 36-46 (Wathen, J., dissenting); Thibodeau, 496 A.2d at 643-45 (Wathen, J., dissenting) (quoting California v. Beheler, 463 U.S. 1121, 1125 (1983)). In reaching this conclusion, the dissent recognized that this Court has expressly rejected the notion that police "focus" and a "coercive environment" amount to custody for purposes of Miranda. App. A at 36-37, 44-45 (Wathen, J., dissenting); Thibodeau, 496 A.2d at 643, 645 (Wathen, J., dissenting) (citing Beheler; Oregon v. Mathiason, 429 U.S. 492 (1977); Beckwith v. United States, 425 U.S. 341 (1976)).

REASON FOR GRANTING THE WRIT

A MAJORITY OF THE MAINE SUPREME JUDICIAL COURT HAS DECIDED THE ISSUE OF WHETHER RESPONDENT WAS "IN CUSTODY" UNDER MIRANDA IN A WAY THAT DIRECTLY CONFLICTS WITH THIS COURT'S DECISIONS IN CALIFORNIA V. BEHELER, OREGON V. MATHIASON, AND BECKWITH V. UNITED STATES.

In State v. Thibodeau, 496 A.2d 635 (Me. 1985), a majority of the Maine Supreme Judicial Court held that Respondent was "in custody" for purposes of Miranda v. Arizona, 384 U.S. 436 (1966), on the basis of a combination of factors - viz., 1) the focus of the police investigation on Respondent and 2) certain allegedly coercive aspects of Respondent's interaction with the police - that this Court has expressly held do not constitute custody. Since previous decisions of the

Supreme Court show clearly that there was no custody under the circumstances of the instant case, the Maine Court's holding to the contrary should be summarily reversed or, alternatively, subjected to plenary review by this Court.

The first factor on which the Maine Court relied was that by the afternoon of October 28, 1983, in light of the interview with Thibodeau that morning, the police investigation of John Tower's disappearance had focused on Respondent as the "only suspect." App. A at 16-17; Thibodeau, 496 A.2d at 639 (emphasis in opinion). In California v. Beheler, 463 U.S. 1121 (1983) (per curiam), however, this Court reiterated what it had said in Beckwith v. United States, 425 U.S. 341, 347 (1976), that Miranda's "in custody" requirement is

not satisfied merely because police knowledge about the crime has reached a level where the person interviewed by the police is the "focus" of the criminal investigation. Beheler, 463 U.S. at 1124 n.2. This Court also repeated in Beheler what it had earlier stated in Oregon v. Mathiason, 429 U.S. 492 (1977) (per curiam), that "Miranda warnings are not required 'simply... because the questioned person is one whom the police suspect.'" Beheler, 463 U.S. at 1125 (quoting Mathiason, 429 U.S. at 495). In view of Beheler, Mathiason, and Beckwith, the great weight that the Maine Court attached to the fact that the police had focused on Respondent as the "only suspect" (App. A at 17; Thibodeau, 496 A.2d at 693 (emphasis in opinion)) is misplaced.

The second factor on which the Maine Court relied to find custody were the allegedly coercive aspects to Thibodeau's afternoon interaction with the police. These included the facts that (1) in the majority's view a reasonable person would have felt, as did Respondent, that he had no choice but to accompany the officers (App. A at 17-18; Thibodeau, 496 A.2d at 639), and (2) Respondent was in the back seat of the two-door police car and never asked by the police if he wanted to leave. App. A at 18-19; Thibodeau, 496 A.2d at 639-40 (footnote omitted). Neither one of these facts, however, supports a finding of custody.

This Court has expressly rejected the notion that custody exists simply because a reasonable person, who has neither been

formally arrested nor been restrained in his freedom of movement, feels when in the presence of police officers that he must answer their questions or comply with their requests:

> [A] noncustodial situation is not converted to one in which Miranda applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a "coercive environment." Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer Miranda warnings to everyone whom they question.

that under the circumstances at hand such a perception was one that would be held by a reasonable person. When the Defendant left with the officers he had no idea, or, for that matter, cause to suspect, that he would be driven down a side street and interrogated in a parked cruiser; he was asked only to show the officers the route he had taken the day before. Once he accompanied the officers the Defendant was never told that he was free to leave and, in order for him to have left the cruiser, an officer in the front would have had to open one of the doors and pull his seat forward. Similarly, in the hour and a half that the Defendant was with the officers in this police-dominated atmosphere,[1] he was never asked if he wished to take a

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[1] See State v. Preston, 411 A.2d 402, 405 (Me. 1980) (coercive nature of the interrogation found to be enhanced when it was conducted in a police car).

break or return home. The combination of these factors amounted to a custodial setting. He was then and there deprived of his freedom in a significant way. Moreover, armed with what they then knew, the officers had ample grounds to anticipate that the Defendant's responses in the afternoon interrogation would prove incriminating. Even in light of the appropriate deference we accord to motion justices' determinations, Miranda warnings clearly should have been given to this young man.

To describe the afternoon questioning as merely an elaboration of the morning's account would be wholly inaccurate. Significantly, as the State conceded at oral argument, the Defendant's statements were strategically used by the State to impeach the Defendant's credibility at

trial by providing examples of the number of ways in which the Defendant had changed his story. The distances of the routes that the Defendant claimed to have taken, both with the victim and when alone hunting, prompted the officers to ask again what time he had returned home on October 27. The officers commented to the Defendant that he had walked farther than the oridinary person could in such a time span. In response, the Defendant changed the time he originally purported from 4:00 or 4:30 to 6:30 P.M. Although admittedly intended by the Defendant to be exculpatory, those statements, later proving to be blatantly incriminating, were made during a custodial interrogation without the giving of Miranda warnings.

In sum, such evidence at the hearing on the motions compels a conclusion that

evidence of the afternoon confrontation should have been suppressed.

Moving on to the next issue, the Defendant argues that his written and oral confessions, along with other evidence obtained on the day of his arrest, were not given voluntarily and were the products of an illegal arrest. A finding of an illegal arrest will not necessarily preclude subsequent statements from admission into evidence. See State v. Bleyl, 435 A.2d 1349, 1360 (Me. 1981); Brown v. Illinois, 422 U.S. 590, 601-602, 45 L. Ed. 2d 416, 426, 95 S.Ct. 2254 (1975). In the case before us we need not scrutinize the alleged illegality of the arrest, because we identify no causal connection between the circumstances directly surrounding the arrest and the Defendant's subsequent

statements.[2] In Bleyl, we set forth the following factors in determining whether statements made after an illegal arrest are admissible: (1) the voluntariness of the statements; (2) whether Miranda warnings were given; (3) the time span between the arrest and the statements; (4) the existence of intervening circumstances; and (5) the nature of the police misconduct. 435 A.2d at 1360 (citations omitted).

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[2] In the record we find conflicting accounts on whether the officers' misrepresentation that they were at the Defendant's residence to take him "to be fingerprinted for elimination" was made before or after gaining physical entry. See Payton v. New York, 445 U.S. 573, 63 L. Ed. 2d 639, 653, 100 S. Ct. 1371 (1980) (a warrantless, nonconsensual entry into a person's home in order to effect an arrest, in the absence of exigent circumstances, violates the Fourth Amendment). The State did not contend that the exigent circumstances exception was applicable; both parties focussed on whether proper consent was given.

"Voluntariness" concerns not only the specific actions of the police, but also the mental and physical condition of the defendant. State v. Caouette, 446 A.2d 1120, 1123 (Me. 1982). Article I, Section 6, of the Maine Constitution, places upon the State the burden of proving voluntariness beyond a reasonable doubt. Id. at 1122; see also State v. Collins, 297 A.2d 620, 626 n.5 (Me. 1972). Although it it indeed evident from listening to the recorded confession that the Defendant was upset, we find adequate support for concluding that the Defendant spoke from the free choice of a rational mind. See State v. Mikulewicz, 462 A.2d 497 (Me. 1983). The Defendant testified at the motion hearing that he understood his rights, knew what he was saying and writing, and did not feel threatened or coerced by the officers.

The situation in the case at bar stands in sharp contrast to the defendant's failure in Caouette to remember even the events following his arrest. This Defendant appears to have had a vivid recollection of everything that transpired. In addition, the officers gave the Defendant the Miranda warnings several times and inquired whether he understood his rights to remain silent and to have an attorney present. The Defendant explicitly acknowledged his understanding and even repeated his rights to the officers. Over an hour passed from when the Defendant was taken from his home and when he confessed. He testified that he knew that the officers would be back for him and that they were there for that purpose on November 1. Seemingly, the Defendant was not taken by surprise when he was arrested; the fact there was a misrepresentation used in

effectuating the arrest, a ruse which we do not condone, did not appear to influence the Defendant's state of mind. We find no error in denying his motion to suppress the statements he made on the day of his arrest.

The Defendant next contends that the Superior Court erred in denying his motion to strike evidence concerning the test firing of the murder weapon. He claims unfair surprise as a result of a discovery violation that was disclosed in testimony regarding the distances that shell casings were ejected. When it is determined that the State has failed to comply with the discovery requirements of M.R. Crim. P. 16(b)(2)(B),[3] the presiding justice

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[3] Rule 16(b)(2)(B) provides:

(b) Discovery Upon Request.

. . .

(2) Scope of Discovery.

has broad discretion under M.R. Crim. P. 16(d)[4] in deciding what, if any,

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> The following matters are discoverable:
>
> . . .
>
> (B) Any reports or statements of experts, made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons.

[4] Rule 16(d) provides:

> If the attorney for the State fails to comply with this rule, the court on motion of the defendant or on its own motion may take appropriate action, which may include, but is not limited to, one or more of the following: requiring the attorney for the State to comply, granting the defendant additional time or a continuance, relieving the defendant from making a disclosure required by Rule 16A, prohibiting the attorney for the State from

sanctions are necessary to protect the defendant from unfair prejudice. State v. Mylon, 462 A.2d 1184, 1186 (Me. 1983) (citations omitted). In the instant case, the Defendant was informed during discovery that the murder weapon, when tested, ejected a shell casing a distance of 13 feet and 9 inches. At trial, Trooper Gallant testified that he had fired the weapon 20 or 25 times with the maximum ejection distance being 13 feet and 9 inches. While we agree with the Defendant that the State's statement during discovery was somewhat misleading in that it implied only one test firing, we discern no real prejudice resulting from the evidence that was admitted, but not divulged during discovery. The Defendant at no time made

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introducing specified evidence and dismissing charges with prejudice.

a motion for a continuance or otherwise expressed a desire for additional time to procure his own tests. Finding no abuse of discretion in the Superior Court's denial of the motion to strike, we do not now provide a remedy for the Defendant's failure to test the weapon.

Finally, upon a careful review of the record, we find no merit in the Defendant's argument that there was insufficient evidence to support his conviction.

The entry is:

Judgment vacated.

Remanded for further proceedings consistent with the opinion herein.

Violette, Glassman and Scolnik, JJ., concurring.

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WATHEN, J., with whom McKUSICK, C.J., and ROBERTS, J., join dissenting

I must respectfully dissent. I disagree with the holding of the Court that the statement obtained from defendant during the afternoon of October 28, resulted from a custodial interrogation. The Superior Court found no custodial interrogation. This Court now adopts a contrary view of the facts and departs totally from the usual standard of review

requiring clear error to reverse a finding of the trial court.

The Superior Court was required to find as fact whether defendant was "deprived of his freedom in some significant way, or would be led, as a reasonable person, to believe he was not free to leave the presence of the police." State v. Bleyl, 435 A.2d 1349, 1358 (Me. 1981). The Court found as follows:

> Further, the circumstances did not constitute custodial interrogation. Thibodeau cooperated with the detectives in generally non-coercive settings. Neither his situation in the cruiser nor the suspicions of the police reached a level requiring a statement of Thibodeau's 'rights.'

The ruling of the trial court should be upheld if the record provides rational support for its determination. State v. Longley, 483 A.2d 725, 730 (Me. 1984).

This Court concludes that although the interview conducted on the morning of October 28 amounted only to a general investigation of a missing person report, as a matter of law, the afternoon interview rose to the level of a custodial interrogation. An examination of the record reveals that the information known to the police before the morning interview was as follows: On October 27, Tower's relatives reported him as missing. During the evening of the 27th, officers located his unattended vehicle. Numerous witnesses confirmed that defendant was the last person to be seen with Tower. When the officers conducted the afternoon interview they had no information in addition to that which they had in the morning. One of the investigating officers described the state of the investigation as it existed at the

conclusion of the afternoon interview, in the following terms:

> There was no crime. There was an individual who out of his normal routine of life had changed, and at that point we did not know whether perhaps Mr. Tower had a medical problem or just what. We did not know.

Neither in the morning, nor in the afternoon, did the officers have any information concerning the whereabouts of Mr. Tower or the state of his health.

Throughout the entire investigation the police were understandably concerned about the possibility that Tower might be dead or incapacitated. The majority characterizes the afternoon interview as a ploy and an exploitation. The evidence, however, contains only the following account of the officer's purpose in returning to the Thibodeau residence:

> Purpose was to go and to determine what Mr. Tower might have done after he left Mr. Thibodeau, perhaps there was conversation that would have suggested what his intentions were to do the rest of the day, general information in regards to Mr. Tower, and the route of travel they took and anything that might have happened to interrupt Mr. Tower's intention of what he planned to do the rest of the day.

On both occasions when defendant was interviewed on October 28, the police were investigating a report of a missing person and had no evidence that Mr. Tower had been murdered.

In spite of the absence of any change in the information known to the police, this Court constructs an elaborate transformation of the attendant circumstances and finds that a legally significant change occurred between the

morning and afternoon of October 28. From the record the Court gleans four circumstances and concludes that the cumulative effect of these circumstances is to produce a "custodial setting." The circumstances noted are as follows: (1) the officers suspicions had increased by the afternoon and the plans for questioning had been altered; (2) defendant testified he did not wish to go with the officers but felt he had no choice; (3) defendant remained in the car for an hour and a half and was never told that he was free to leave nor was he asked if he wished to take a break; and (4) defendant was seated in the back seat of a two-door unmarked cruiser. The Court's analysis fails to demonstrate that the evidence compels a result contrary to that reached by the Superior Court. Indeed, the analysis

includes conclusions that are contradicted, rather than compelled, by the evidence. In my judgment the Court has usurped the function of the factfinder and has failed to state a basis for reversal. In order to reverse the Superior Court, we must find that the evidence compels a contrary result.

The first two circumstances noted, should not be considered on appeal. The Superior Court did not find that the officers suspicions had increased by the afternoon. In fact the principal investigating officer acknowledged on cross-examination that before the morning interview, defendant was the "only possible suspect" in the sense that "he was the last person we knew of at that time that would have been with Tower." The record contains no evidence of any subsequent change in the nature of the officer's suspicion or the

basis for his suspicion.[1] Beyond the factual accuracy of the Court's assumption, the United States Supreme Court has explicitly rejected the notion that Miranda warnings are required simply "because the questioned person is one whom the police suspect", even when the questioning takes place in the station house. Oregon v. Mathiason, 429 U.S. 492, 495 (1977). Similarly, an interrogation is not custodial merely because the police

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[1] The Court's opinion refers to defendant's statement to the officers that he assumed he was a suspect. Because this statement appears only in the transcript of the trial testimony and does not appear in the record of the suppression hearing, it has no bearing on the denial of the suppression motion. The officers never told defendant that they considered him to be a suspect nor did they question his truthfulness until after the afternoon interview was completed. Only at that point did they suggest that the distance he claimed to travel on foot was inconsistent with his arrival time.

interviewed a person who was the "focus" of a criminal investigation. See California v. Beheler, ___U.S. ___, ___, 103 S.Ct. 3517, 3519 n.2 (1983); Beckwith v. United States, 425 U.S. 341, 347 (1976). With regard to the second circumstance, the hearing justice was not required to accept, and did not accept, defendant's conclusory testimony that he felt he had no choice but to go with the officers. It is beyond dispute that the factfinder is free to reject evidence. Further strength is added to the hearing justice's conclusion by the fact that defendant testified at the suppression hearing and acknowledged that his purpose in accompanying the officers was "to keep them off [his] track."

In assessing the effect of defendant's presence in the police cruiser, this Court appears to be troubled by the duration of the interrogation and the fact that

defendant was never expressly advised that he was free to leave. The Court assumes that a lengthy interrogation was conducted and that defendant was not even offered a break. The record does not support this version of the events. When the officers' approached defendant in the afternoon they "asked Jay if he would go with us and show us where he had gone with Mr. Tower and what he himself had done for the previous day." After getting into the car they stopped to permit one officer to take notes while defendant repeated what he had told the officers during the morning conversation. The estimated time of that stop varies from 15 to 30 minutes. The officer's testimonial summary of defendant's statement consumes five solid pages of typed transcript. After listening to defendant repeat his earlier statement

concerning the route he followed on the prior day, the three retraced the complicated route he outlined. The subsequent events were described by one of the officers as follows:

> A. We drove out from where we were parked, which was within sight of Route 159, also called the Houlton Road. We drove out to that intersection and took a left toward Island Falls, and we drove past the Tower residence, which is situated on that highway, on by the Department of Transportation garage, continued on to the intersection of the Hat Farm Road. We drove to the end of that road. There were some boulders across the roadway there. At this point, Mr. Thibodeau indicated that they were there the day that he walked in there hunting. We turned around there, and we drove back to the intersection of 159. He then directed us back towards Patten indicating he walked on

the left going back towards Patten, on the right coming toward Island Falls, so it was the same side of the highway. We drove back to the Tower residence. Here he said he was where they started driving the vehicle. He took us up to the stop sign, which is adjacent to the Chevron station, Carver's Chevron station. We then took a right up Main Street. He indicated at this point that they drove just up as far as the cemetery, that Mr. Tower turned into the cemetery, backed out, and then drove back downtown, and he was dropped off in front of the apartment. There was no indication at that time by Mr. Thibodeau that they drove on any of the back streets of Patten.

Q. Okay. did he then -- did you trace his hunting route with him, where he went after he was dropped off by Mr. Tower?

A. We did. He indicated after getting out of the vehicle, walked up back to Pat's Pizza and then back down over the hill, which

we drove down Mill Street to the housing development where his grandfather lives. We drove into the housing development that time, and he showed us which house it was that his grandfather lived in. He showed us the fence that he jumped over when he deposited the gun behind the house. We turned around and went back the same route, down Mill Street to the junction of Route 11. We turned left, went south on Route 11 a number of miles to the junction of Route 11 and the Happy Corner Road. We turned right onto the Happy Corner Road and drove up that road to the junction of the Frenchville Road, turned right onto the Frenchville Road, went in there a couple of miles or so to this house he pointed out. It was burnt. I think it had a grayish trim. I'm not sure of the color. We were going to drive out back a little bit, but it was pretty rough going. He said he hunted out behind that house for about 20 minutes. Then we turned

around and drove back the same route until we came to the Charles Kinney residence. As we had passed it previously, he had indicated, as he walked along this road, which by the way was the only time he'd ever walked this route, that there were some men working on an old pickup there. So we pulled into the driveway, and Trooper Graves went inside and conducted an interview of the people there.

Q. That's with Mr. Kinney?

A. I believe so, yes.

Q. So approximately how long had you stopped at the Kinney residence?

A. I don't believe we was there over ten minutes.

Q. And where was Mr. Thibodeau during this time?

A. Mr. Thibodeau was still seated in the back of Mr. Graves' vehicle.

Q. And when Mr. Graves came back into the vehicle, was anything said

> that you can recall of what his interview had been about or uncovered or anything?
>
> A. No, there was nothing said at that time.
>
> Q. So when Mr. Graves got back in the car and all of you were in the car, what occurred next?
>
> A. We backed out onto the highway and drove into Patten where he was dropped off at his apartment -- Mr. Thibodeau.

In my opinion the evidence satisfactorily accounts for the duration of the meeting between defendant and the officers.[2] It does not support the conclusion that there was a one and one half hour interrogation. It is true that the officers never expressly told defendant

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[2] The only suggestion of the actual distances involved is the officers testimony that the route defendant claimed to walk while hunting was 14 miles.

that he was free to leave, however, there is no authority, and the Court cites none, for the proposition that a Miranda warning is mandated by the failure of the police to expressly advise a person that he is free to leave.

In the final analysis we are left with the unchallenged fact that defendant seated himself in the rear seat of a two-door, unmarked car while in the company of two plain-clothes officers. In two cases that present far more compelling circumstances than the present case, the United States Supreme Court has summarily held that Miranda warnings are not required "simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect." Oregon v. Mathiason, 429 U.S. 492, 495 (1977); see also California v. Beheler, ___

U.S.___, ___, 103 S.Ct. 3517, 3520 (1983). The Supreme Court has clearly held that the ultimate inquiry in a case such as this is "simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." California v. Beheler, ___U.S. at ___, 103 S.Ct. at 3520. Further, in remarks which apply directly to this Court's opinion, the Supreme Court has stated, "[s]uch a noncustodial situation is not converted to one in which Miranda applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a 'coercive environment.'" Oregon v. Mathiason, 429 U.S. at 485. In a manner consistent with the Supreme Court decisions, we have previously held that the Miranda rule is

not necessarily implicated by the fact that a defendant's conversation takes place in a police cruiser. State v. Lewis, 373 A.2d 603, 607 (Me. 1977). I decline to adopt a different rule solely because the defendant happens to sit in the rear of the car rather than the front. The impairment in defendant's freedom of movement resulting from his location in the back seat, does not rise to the "degree associated with a formal arrest."

The record rationally supports the ruling of the hearing justice. The afternoon interview was merely a continuation of the interview conducted at defendant's home in the morning. Defendant did not ask to leave the car at any point. In fact, in an effort to lead the officers astray, he eagerly participated in showing the officers the route he claimed he

followed on the day in question. The afternoon interrogation was neither prolonged nor accusatory in nature. Surely, the presiding Justice committed no error in concluding that defendant was not restrained in his freedom of movement to the degree associated with a formal arrest.

I would affirm the conviction.

APPENDIX B

STATE OF MAINE
PENOBSCOT, ss.

SUPERIOR COURT
Criminal Docket
No. 83-658

****
STATE OF MAINE *
*
V. * OPINION AND ORDER
*
JAY G. THIBODEAU *
Defendant *
****

This matter was heard on motion of the Defendant to suppress statements and physical evidence. This opinion addresses only the statements. Jay Thibodeau was first questioned concerning the death of John Tower on October 28, 1983, initially at his home and later while riding in a police vehicle. Mr. Tower's body had not been discovered. No Miranda warnings were given. On November 1, 1983, Defendant was questioned again, after being taken into effective custody. He left his home on

that date with the officers in response to a request for fingerprints, and he confessed shortly after arriving at the Houlton Police Station. Later a written confession was obtained, after which the police had him revisit the Shin Pond crime scene where he further described Tower's death.

The statements given on the 28th were voluntary, beyond a reasonable doubt. Further, the circumstances did not constitute custodial interrogation. Thibodeau cooperated with the detectives in generally non-coercive settings. Neither his situation in the cruiser nor the suspicions of the police reached a level requiring a statement of Thibodeau's "rights".

Except for one ambiguous remark which the State does not intend to offer,

appropriate warnings were given before the November 1 statements. The defense contends that the statements should be suppressed according to principles enunciated in Payton v. New York, 445 U.S. 573 (1980). Thibodeau was removed from his home that morning through subterfuge. No arrest warrant was obtained, although the police had apparent authority to enter under a search warrant. The officers had probable cause to arrest. Although Thibodeau was never directly advised that he was under arrest, he apparently understood that to be his status almost from the outset.

Whatever the right of entry or seizure, the statements would only be suppressed if they were generated by the arrest. State v. Bleyl, 435 A.2d 1349 (Me. 1981); State v. Ann Marie C., 407 A.2d 715 (Me. 1979).

In this instance, no causal relationship exists. No force was used to obtain custody, Miranda was complied with, and the subterfuge was not maintained. The statements were independently produced, and will not be excluded as the fruit of an illegal arrest (if such it was).

The initial statements were also clearly voluntary. Although Thibodeau was under emotional strain, he was capable of reasoned decisions. In initially saying "I did it" and in giving the taped statement, he was moved by a valid desire to confess. State v. Caouette, 446 A.2d 1120 (Me. 1983). He incriminated himself by a free act of will, beyond a reasonable doubt.

The taped confession ends at 10:52, at which time Defendant had completely broken down. After a hiatus of a little more than one hour, Thibodeau began writing a

statement at 12:06, ending at 1:45. Further oral admissions were made during that time. Other statements were given later upon a visit to the crime scene and in the course of the trip to Bangor for arraignment. All these statements seem to the Court to be voluntary, as the Defendant essentially acknowledged.

The State has the burden of proving voluntariness beyond a reasonable doubt. Dealing with the written confession, the Defendant testified that having confessed once, he figured he might just as well write it out. The Court is satisfied that this conclusion was reached independently, without official pressure. Officer Porter's statement about writing style and later direction to keep writing were not part of the motivation to confess. Thibodeau wanted to get it off his chest and over with.

That leaves three other statements: the negation of homosexuality, the description at the scene, and conversation going south from Shin Pond. The first and third appear free and spontaneous. The circumstances surrounding the excursion to Shin Pond are less clear, but the Court finds, beyond a reasonable doubt, that the Defendant exercised independent will in not rejecting the request to go. He knew he had a choice.

In ruling that this last statement is voluntary, the Court finds further that it was not the product of a violation of Rule 5, M.R. Crim. P. This case is very close to the line of "unnecessary delay". The police improperly approached arraignment as a matter of choice, not right. The side trip to Shin Pond is at best marginally justifiable as part of a search for evidence. At worst it was "gilding the

lily". Applying Bleyl and Ann Marie C., supra, however, the delay, even if unnecessary, did not cause the admissions. It merely provided an opportunity for them. Thibodeau was not worn down by the passage of time, and his conduct at Shin Pond is admissible.

The entry is: Defendant's motion to suppress statements is denied.

DATED: 2/27/84

Jessie H. Briggs
Justice, Superior Court